S.B. CIVIL WRIT PETITION NO.6941/2003

Sobha Devi vs. Hansa Ram & ors.

Date : 15.12.2004

HON'BLE MR. PRAKASH TATIA, J.

Mr. S.N. Trivedi, for the petitioner.
None present for respondents.

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Heard learned counsel for the petitioner as none has appeared for the respondents despite service.

It appears from the facts of the case that the first round of litigation went in favour of the plaintiff/petitioner as this Court decided the appeal in favour of the petitioner who was plaintiff in the earlier round of litigation. It appears that during the pendency of the appeal before this Court, the plaintiff filed another suit seeking injunction against the respondents. Since the appeal itself was decided in favour of the petitioner, therefore, he withdrew the suit from the trial court. But before the withdrawal of the suit by the plaintiff, the defendant/respondent submitted counter claim before the trial court. The trial court vide order dated 4.9.2002 dismissed the suit of the plaintiff as withdrawn but held that the counter claim would proceed. In that proceedings before the trial court, an ad-interim order was passed by the trial court on 5.9.2002 as the non-applicant in the proceedings under Order 39 Rules 1 and 2 C.P.C. sought time

to file reply. The order is to maintain status quo. The case was fixed for reply of the non-applicant on 20.9.2002.

The petitioner is aggrieved against the order dated 5.9.2002 by which the trial court made interim arrangement during the intervening period of deciding the main injunction application.

According to the learned counsel for the petitioner, since all the issues have been decided in the earlier round of litigation, therefore, the counter claim cannot proceed and the court below has committed illegality in passing the order dated 5.9.2002. It is also submitted that the trial court should not have kept the counter claim after dismissal of the suit of the plaintiff.

The argument advanced by the learned counsel for the petitioner is absolutely misconceived as merely because of withdrawal of the suit by the plaintiff, the counter claim of the defendant cannot be dismissed. It is another matter whether the issues raised by the defendant in the counter claim cannot be tried by the trial court in view of the bar of res judicata. That is a matter of fact to be decided by the trial court in accordance with law but the trial court could not have presumed that all the issues which have been raised in the counter claim stand decided without there being a proper plea raised by the concerned party.

So far as the order dated 5.9.2002 is concerned, it is an order passed making interim arrangement till filing of the reply to the injunction application by the opposite party.

In these facts and circumstances, this Court is not inclined to interfere in the order of the trial court under Article 227 of the Constitution of India. The trial court, if, has not decided the injunction application is directed to decide the injunction application within one month from the placing of the certified copy of this order by the petitioner.

Accordingly, this writ petition is dismissed with the aforesaid observations.

(PRAKASH TATIA), J.

S.Phophaliya